U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 16Oct2001

In the Matter of	:	
	:	
BILLY R. COLLINS,	:	Case Number: 2000-BLA-85
Claimant,	:	
	:	
v.	:	
	:	
LITTLE DAVID COAL CO., INC.,	:	
Employer,	:	
	:	
and	:	
	:	
DIRECTOR, OFFICE OF WORKERS'	:	
COMPENSATION PROGRAMS,	:	
Party-in-Interest.	:	
	:	

Lawrence L. Moise, III, Esquire
For the Claimant

Russell Vern Presley, II, Esquire
For the Employer

Before: EDWARD TERHUNE MILLER
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

Statement of the Case

This proceeding involves a modification of a miner's subsequent claim for benefits under the Black Lung Benefits Act as amended, 30 U.S.C. §901 *et seq.* (the "Act"), and the regulations promulgated

thereunder.[1] Since Claimant filed this application for benefits after March 31, 1980, Part 718 applies. This claim is governed by the law of the United States Court of Appeals for the Sixth Circuit as Claimant was last employed in the coal industry in Tennessee. *See Shupe v. Director, OWCP*, 12 B.L.R. 1-202 (1989) (*en banc*).

Claimant, Billy R. Collins, filed his first claim for benefits on February 15, 1991 (D-1). The claim was denied by the Department of Labor claims examiner on July 3, 1991 for failure to prove any of the elements of eligibility (D-16). Claimant timely requested a hearing before an administrative law judge (D-17). A conference was held on March 17, 1992 (D-35). The corresponding Memorandum of Conference and Stipulation of Uncontested and Contested Issues, dated April 23, 1992, recommended upholding the July 3, 1991 denial. *Id.* Claimant did not accept the District Director's recommendation, and, again, requested a formal hearing (D-38). A second conference took place on May 26, 1993 to determine the identity of the properly designated responsible operator (D-57)[2]. No hearing took place, and Claimant filed a request for modification on October 20, 1993, submitting a single x-ray re-interpretation as the only new evidence to be considered (D-60). The District Director denied the request for modification on October 22, 1993, after which the Claimant requested a formal hearing (D-62, 65).

Administrative Law Judge Stuart A. Levin issued a Decision and Order denying benefits on September 19, 1994 (D-82). While Judge Levin found that the Claimant suffered from a disabling pulmonary impairment arising out of his smoking history, he found that the Claimant failed to establish that he had pneumoconiosis or that his pulmonary disability arose out of coal mine employment.

Claimant again requested modification on August 3, 1995, and Judge Levin issued an Order Denying Modification on May 13, 1996 (D-84, 95). Claimant had only added two x-ray readings to the record, and as both were negative for pneumoconiosis, he failed to establish a change in conditions. Review of the record did not reveal a mistake in determination of fact. Upon Claimant's submission of additional evidence on March 26, 1997, consisting of a pulmonary function study, a medical report including pulmonary function testing, an x-ray report, and an arterial blood gas study, and miscellaneous progress notes, Claimant initiated a new request for modification (D-96, 97). The District Director entered a Proposed Decision and Order Denying Request for Modification on July 8, 1997 (D-104). The District Director found that the Claimant had failed to establish the existence of pneumoconiosis and total disability due to pneumoconiosis, and, therefore, had failed to prove a change in conditions. Thereafter, on July 29,

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[1] All applicable regulations which are cited in this Decision and Order are included in Title 20, Code of Federal Regulations, and are cited by part or section only. The Director's exhibits are denoted "D-"; Claimant's exhibits, "C-"; Employer's exhibits, "E-"; and the hearing transcript "Tr."

[2] The corresponding Memorandum listed Little David Coal Company as the properly designated responsible operator, however, Little David Coal continued to dispute the designation (D-57, 58).

1997, Claimant requested a formal hearing (D-105).

Administrative Law Judge Richard A. Morgan issued a Decision and Order Denying Benefits on July 24, 1998 (D-116). Based on review of newly submitted evidence and evidence submitted in conjunction with the original claim, Judge Morgan found that Claimant established that he is totally disabled from a pulmonary standpoint. However, he also concluded that Claimant failed to establish that he suffered from pneumoconiosis arising out of his coal mine employment or that his total disability is due to pneumoconiosis. Accordingly, Judge Morgan found that Claimant had not proven either a change in condition since the last denial of his claim or a mistake of a determination of fact.

On May 13, 1999, Stone Mountain Health Services, on behalf of Claimant, submitted to the District Director evidence consisting of an x-ray reading and pulmonary function testing results, which was accepted as an initiation of another request for modification (D-117, 118). A Proposed Decision and Order Denying Request for Modification was issued on July 15, 1999 based on the District Director's finding that the newly submitted evidence along with the evidence previously in the file does not show that Claimant is totally disabled by coal workers' pneumoconiosis caused by his coal mine employment, and that Claimant "has not established that there is a change in material condition since the time of the prior decision and has not established that a mistake was made in a finding of fact made at the time of the prior decision." (D-122). Claimant requested a formal hearing on July 20, 1999 (D-123). This case was referred to the Office of Administrative Law Judges by the District Director for a formal hearing on October 29, 1999 (D-129).

A hearing was held in Abingdon, Virginia before Administrative Law Judge Edward Terhune Miller on March 8, 2000, at which Claimant testified and was represented by counsel and all parties were afforded a full opportunity to present evidence and argument. Director's Exhibits one (1) through one-hundred-thirty (130) were admitted into evidence (Tr, 6). Claimant's Exhibit one (1) was also admitted into evidence. However, because Employer had never received a copy of the exhibit, a medical report, Employer was granted forty-five days to respond (Tr, 10-11). Claimant also requested and was granted thirty days leave post-hearing to submit any additional evidence. Employer was granted thirty days from that point in time to submit rebuttal evidence (Tr, 12-17).

At the hearing, Employer submitted Employer's Exhibits one (1) through four (4) (Tr 36-37). By cover letter dated April 4, 2000, Claimant submitted Claimant's Exhibits one (1) through five (5). Pursuant to leave by this tribunal, by cover letters dated April 3, April 20, April 24, May 2, and May 17, 2000, Employer submitted Employer's Exhibits five (5) through nine (9), respectively.

The findings and conclusions that follow are based upon an analysis of the entire record, together with applicable statutes, regulations and case law, in relation to those issues which remain in substantial dispute.

Issues

1. Whether the Claimant worked at least fifteen years in or around one or more coal mines?
2. Whether the Claimant has one dependent for purposes of augmentation?
3. Whether Little David Coal Company is the properly designated responsible operator?
4. Whether Little David Coal Company, if found to be the properly designated responsible operator, has secured the payment of benefits through insurance?
5. Whether the Claimant has pneumoconiosis as defined by the Act and the regulations?
6. Whether the Claimant's pneumoconiosis arose out of his coal mine employment?
7. Whether the Claimant is totally disabled?
8. Whether the Claimant's disability is due to pneumoconiosis?
9. Whether the evidence establishes a change in conditions and/or a mistake in the determination of any fact in the prior denial pursuant to §725.310?
10. If so, whether Claimant has established the other elements of entitlement to benefits under Part 718, namely, that he is totally disabled due to pneumoconiosis?

Findings of Fact and Conclusions of Law

Background

Claimant, Billy R. Collins, was born on July 19, 1945, and possesses a seventh grade education (D-1; Tr,19). He married his second wife, Sherry Elaine McConnell, on March 20, 1973 and they were still married at the time of the hearing. *Id.* Claimant's previous marriage lasted about three years and ended in divorce (Tr,19). Claimant has no dependent children at home and is not under any spousal support or alimony obligations. *Id.* Claimant maintains that he worked in the coal mines for fifteen years (D-1). During his years of coal mine employment, Claimant worked primarily as a roof bolter, which required him to lift sixty pound bundles of bolts eighty to one hundred times during an average nine-hour shift (D-1; Tr, 22). Claimant was last employed on January 6, 1991 by Jericol Mining Company, for whom he worked for approximately two months as a pinning machine operator (Tr, 20-21). Claimant ceased working in 1991 due to a back injury (Tr, 33). Thereafter, he filed for and now receives Social Security Disability based upon his back injury and his lung condition. *Id.*

Claimant testified that he first noticed problems with his breathing while still working in the mines, and that his problems have worsened over the years (Tr, 29-30). At the time of the hearing, Claimant had utilized an oxygen tank and machine for twenty-four hours a day for approximately eight months. *Id.* Claimant further testified that over the last two years, he has needed to stop and rest if he walks any distance (Tr, 35). For the past seven or eight years, Claimant has not been able to do any yard work or go hunting. *Id.*

Claimant testified that he began smoking around the age of thirteen or fourteen, and that he quit several times before finally quitting three years prior to the hearing (Tr, 27-28). When he did smoke, Claimant smoked approximately three-quarters of a pack per day. *Id.* On cross examination, Claimant

agreed that his smoking history was accurately described by Dr. Robinette as a thirty pack year smoking history (Tr, 34).

Responsible Operator

Little David Coal Company contests that it is the properly designated responsible operator. In the previous two denials of this claim, both the District Director and the Administrative Law Judges found Little David Coal Company to be the proper responsible operator in accordance with the applicable regulations at §§725.492 and 725.493, now §§725.494 and 495 of the amended regulations (D-57, 82, 107, 116). Similarly, in the current claim, the District Director found Little David Coal Company to be correctly identified as the responsible operator (D-127). The District Director explained, "While the claimant listed numerous coal companies which employed the miner after he last worked for the named operator, none of the periods of employment was for one full calendar year or for at least 125 days of actual work...." *Id*. Upon review of the evidence of record, this tribunal adopts the analysis and conclusion of Judge Morgan in the prior denial (D-116). As this issue has been decided on several occasions and the evidence of record supports such a finding , since Claimant has not worked since the previous denial, this tribunal finds that Little David Coal Company is the properly designated responsible operator.[3]

Insurance

While Employer contested whether it had secured payment of benefits through insurance, at the hearing, Employer represented on the record that it had coverage through Old Republic Insurance Company during the relevant time period and that there was no an insurance issue regarding coverage (D-129; Tr,8). The District Director also found that Employer had valid insurance coverage during Claimant's period of employment with the Employer (D-127). Based on this tribunal's finding that Little David Coal Company is the properly designated responsible operator, and the Employer's admission and the District Director's agreement that it had insurance coverage during the relevant time period, this tribunal finds that the Employer has secured payment of benefits through insurance.

Dependents

The Employer contests whether Claimant has one dependent for purposes of augmentation of benefits. In the prior denial, Employer did not contest this issue and Judge Morgan found that Claimant had one dependent, his wife Sherry, under the Act (D-116). To reiterate, Claimant married his current wife on March 20, 1973, and they were still married at the time of the hearing (D-1, Tr, 19). Since no evidence has been introduced indicating that Claimant's marriage has since dissolved, this tribunal finds that Claimant

[3]At the hearing, Employer maintained that it continued to contest its identity as the responsible operator to preserve the issue in the event that Claimant had returned to work after the previous hearing (Tr, 8). Employer offered no evidence indicating that it was not the responsible operator.

has one dependent, his wife Sherry, pursuant to §§725.204 and 725.205, for purposes of augmentation of benefits under the act.

Length of Coal Mine Employment

Claimant alleges fifteen years of coal mine employment, and prior adjudicators found the evidence of record establishes at least ten (D-129). Employer contests these employment histories. *Id.* For purposes of the Act and regulations, a "miner" is any person who works or who has worked in or around a coal mine or coal preparation facility in the extraction , preparation or transportation of coal, and any person who works or has worked in coal mine construction or maintenance in or around a coal mine or coal preparation facility. §§725.101(a)(19), 725.202(a). The employment history form indicates that Claimant began working underground in the coal mines in 1980 (D-2). However, it also indicates that Claimant was employed in the transportation of coal from the mines as far back as 1974. *Id*. Social Security records confirm that Claimant worked for Turner Trucking Company for the first quarter of 1975 (D- 4). In the employment history form, Claimant maintains that he was employed as a coal truck driver where he was exposed to coal dust (D-2). Claimant's next coal mine employment began in 1980 for Bullion Hollow Coal Company, where he worked for at least two months (D-2, 4). Next, Claimant worked for Fountain Bay Mining Company from May of 1981 through August of 1983. *Id.* Claimant then worked for Little David Coal Company from March of 1984 through March of 1987. *Id.* Thereafter, Claimant worked for Southland Enterprise from September 4, 1987 through August 9, 1988 (D-42, 52, 53). From September 1988 through March 1989, Claimant worked for Mountaineer Coal Company (D-2, 4). From April 1989 through January 6, 1991, Claimant worked for four different coal mining companies for a total of one year and nine months of additional coal mine employment (D-2; Tr, 20).

Based on the employment history form, the social security records, Claimant's testimony and correspondence from a previous employer, this tribunal finds that Claimant has established not more than nine years of coal mine employment within the meaning of §725.101(a).

Applicable Standards

Modification

Any party to a proceeding may request modification at any time before one year from the date of the last payment of benefits or at any time before one year after the denial of a claim. §725.310(a). Upon the showing of a "change in conditions" or a "mistake in a determination of fact" the terms of an award or the decision to deny benefits may be reconsidered. §725.310.[4]

[4] The regulations of the Longshore and Harbor Worker's Compensation Act, 33 U.S.C. §922, are incorporated into the Black Lung Benefits Act by 33 U.S.C. §932(a), and provide statutory authority to modify orders and awards.

To determine whether a claimant has demonstrated a change in conditions, an Administrative Law Judge must conduct an independent assessment of all newly submitted evidence and consider this evidence in conjunction with all evidence of record to determine if the weight of the evidence is sufficient to establish an element or elements of entitlement which were previously adjudicated against the claimant. *Kingery v. Hunt Branch Coal Company*, 19 B.L.R. 1-6 (1994); *Napier v. Director, OWCP*, 17 B.L.R. 1-111 (1993); *Nataloni v. Director, OWCP*, 17 B.L.R. 1-82 (1993); *Kovac v. BCNR Mining Corporation*, 14 B.L.R. 1-156 (1990), *aff'd. on reconsideration*, 16 B.L.R. 1-71 (1992). In his decision dated July 24, 1998, Judge Morgan found that Claimant had not established the existence of pneumoconiosis or total disability due to pneumoconiosis (D-116). Therefore, in order to establish a change in conditions with respect to the pending claim, Claimant must establish either the existence of pneumoconiosis or total disability due to pneumoconiosis.

In *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 257 (1971), the United States Supreme Court indicated that an administrative law judge should review all evidence of record to determine if there has been, with respect to a request for modification, a mistake in a determination of fact. In considering a motion for modification, the administrative law judge is vested "with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *See also Jessee v. Director, OWCP*, 5 F.3d 723 (4th Circuit 1993); *Director, OWCP v. Drummond Coal Company (Cornelius)*, 831 F.2d 240 (11th Circuit 1987).

Entitlement

Benefits under the Act are awardable to persons who are totally disabled within the meaning of the Act due to pneumoconiosis. For the purposes of the Act, under §718.201, pneumoconiosis, commonly known as black lung, means a chronic dust disease of the lung, and its sequelae, including respiratory and pulmonary impairments arising out of coal mine employment. This definition includes both medical, or "clinical" pneumoconiosis and statutory, or "legal" pneumoconiosis. A disease arising out of coal mine employment includes any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment. §718.201(b). To be entitled to benefits under part 718, Claimant must establish by a preponderance of the evidence that (1) he suffers from pneumoconiosis; (2) the pneumoconiosis arose out of coal mine employment; (3) he is totally disabled; and (4) his total disability is caused by pneumoconiosis. *See Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986). Failure to establish any of these elements precludes recovery under the Act.

New Medical Evidence

X-ray Evidence[5, 6]

Exhibit No.	X-ray Date	Reading Date	Physician/ Qualifications	Interpretation
D-117	1/22/99	1/22/99	Gopalan/R[7]	-/-; Severe changes of chronic bronchitis; lungs are markedly emphysematous; prominent markings in both lower lung zones; previously; no pleural effusion noted; density in right apex noted and likely due to the overlying soft tissues.
D-120	1/22/99	6/3/99	Lippmann/B	0/0; Severe COPD; no pneumoconiosis
E-1	9/29/99	10/20/99	Wheeler/B/R	0/0; Moderate COPD with bullous bleb in upper lobes and hyperinflation; tiny calcified granuloma in right apex compatible with healed TB; minimal pulmonary vascular prominence or possible subtle linear interstitial fibrosis; no evidence of silicosis or CWP
E-1	9/29/99	10/18/99	Scott/B/R	0/0; Emphysema; few small calcified granulomata

[5] The following abbreviations are used in describing the qualifications of the physicians: B-reader, "B"; Board-certified radiologist, "R."

[6] An interpretation indicating "-/-" is used by this tribunal to signify that the x-ray was not reported/classified/conducted in accordance with the requirements of §718.102 of the pre-amended regulations.

[7] The professional credentials of this physician are not in evidence. However, this tribunal takes judicial notice that this physician's relevant qualifications are disclosed on the worldwide web, American Board of Medical Specialties, Who's Certified Results, at http://www.abms.org. *See Maddaleni v. Pittsburgh & Midway Coal Mining Co.*, 14 B.L.R. 1-135 (1990).

D-128	9/29/99	9/29/99	Dahhan/B	0/0; emphysema; bullae
C-1	10/22/99	10/22/99	Robinette/B	0/1; s/t; bullous emphysema; bilateral apical pleural thickening
C-1	10/22/99	10/25/99	Coburn/B/R[8]	-/-; Hyperexpansion of the lung; interstitial scarring in lower lung zones bilaterally consistent with the patient's history of coal workers' pneumoconiosis; COPD; slight increase in interstitial markings.
C-4	10/22/99	4/3/00	Cappiello/B/R	1/0; p/p; COPD; emphysema; bilateral upper lobe bullae
C-5	10/22/99	3/31/00	Aycoth/B/R	1/0; p/p; Emphysema
E-9	10/22/99	5/9/00	Wheeler/B/R	0/0; Moderate COPD with bullous blebs in upper lobes and hyperinflation lungs blunting CPAs; probable tiny granuloma in lateral subapical portion lul and linear scar left lower lung at level of cardiophrenic angle
E-9	10/22/99	5/5/00	Scott/B/R	0/0; Hyperinflation lungs compatible with emphysema

[8] The professional credentials of this physician are not in evidence. However, this tribunal takes judicial notice that this physician's relevant qualifications are disclosed on the worldwide web, American Board of Medical Specialties, Who's Certified Results, at http://www.abms.org, and the NIOSH B-Reader List (as of June 21, 1999), which may be found *inter alia* at http://www.oalj.dol.gov/public/blalung/refrnc/bread3cd.htm.

Pulmonary Function Studies[9]

Exhibit No.	Date of Test	Age/[10] Height	Physician	Valid	FEV1	FVC	MVV	Qualify[11]
D-117, 121	8/5/98	53/68	Craven	Yes	.56	1.04	21	Yes
D-128	9/29/99	54/66.25[12]	Dahhan	Yes	.67 .67	1.14 1.21	19 22	Yes
C-1	10/22/99	54/68[13]	Robinette	Yes	.83 .91	1.49 1.49	—	Yes

Dr. Hippensteel determined that the September 29, 1999 study is invalid due to the numerous effects of Claimant's "fair" cooperation and suboptimal effort (E-3). Dr. Hippensteel also found Claimant's suboptimal effort affected the results of the August 5, 1998 study, finding that the results suggest an underestimate of true lung function. *Id.*

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[9] Second set of entries, if any, on the same test relates to results after administration of bronchodilators.

[10] Where there is a discrepancy among measurements of the Claimant's height, this tribunal is required to make a factual finding as to that height. *See Protoppas v. Director, OWCP*, 6 B.L.R. 1-221 (1983). Because the Claimant's height was recorded at 68", 66.25", and 68" (as properly recorded by Dr. Robinette), respectively, this tribunal averages the three to determine his height to be 67.42".

[11] A "qualifying" pulmonary study or arterial blood gas study yields values which are equal to or less than the applicable table values set forth in Appendices B and C of Part 718.

[12] The spirometry report indicates a height of one-hundred-sixty-eight centimeters, which converts to 66.14 inches. Dr. Dahhan recorded a height of sixty-six and one-quarter inches. This tribunal notes the discrepancy, and, finding it harmless, accepts Dr. Dahhan's reported height measurement.

[13] The spirometry report indicates a height of sixty-five inches. However, Dr. Robinette, in the accompanying report, provides a height of sixty-eight inches. This tribunal finds the possible error harmless as the results would be qualifying regardless of whether Claimant was sixty-five or sixty-eight inches.

Arterial Blood Gas Tests

Exhibit No.	Date of Test	Doctor	Conforming	pO_2	pCO_2	Qualifying
D-128	9/29/99	Dahhan	Yes	66.7	46.1	No
C-1	10/25/99	Robinette	Yes	67.0	41.1	No

Medical Reports and Opinions

Dr. Dahhan, who is board-certified in internal and pulmonary medicines, examined the Claimant on September 29, 1999 (D-128). The examination included recordation of Claimant's employment, medical and smoking histories, a chest x-ray, a pulmonary function study, an arterial blood gas study and an EKG. Dr. Dahhan also reviewed submitted records including the x-ray interpretation by Dr. Gopalan, the pulmonary function study conducted on August 5, 1998, and his own report dated October 23, 1997 indicating that he had reviewed the available medical records and concluded that they revealed an obstructive pulmonary disability, which he did not attribute to Claimant's coal mine employment or coal workers' pneumoconiosis. Claimant informed Dr. Dahhan that he had worked for fifteen years as an underground miner and that he had smoked one-half pack of cigarettes per day from the age of seventeen until two years prior to the examination. Based on his examination of Claimant in 1994, review of Claimant's medical records in 1997, and his recent examination and review of medical records, Dr. Dahhan concluded that there is insufficient objective data to justify a diagnosis of coal workers' pneumoconiosis. He found that Claimant has obstructive airway disease, and that from a pulmonary standpoint, Claimant does not retain the capacity to continue his previous coal mine employment or any job of comparable physical demand. Dr. Dahhan found that Claimant's obstructive airway disease did not result from coal dust exposure or occupational pneumoconiosis, explaining that Claimant has not been exposed to coal dust since 1991, a duration of absence sufficient to cause cessation of any industrial bronchitis that he may have had. He further noted that Claimant's treating physician treats him with multiple bronchodilators, a treatment which is inconsistent with the permanent adverse affects of coal dust on the respiratory system. Dr. Dahhan believes that Claimant's impairment would be of the same severity regardless of whether or not he had ever worked in the coal mining industry.

Dr. Emory Robinette, who is board-certified in internal medicine and pulmonary diseases, examined Claimant on October 22, 1999 (C-1). The examination included recordation of Claimant's employment, medical and smoking histories, a chest x-ray, a pulmonary function study, an arterial blood gas study and an EKG. Claimant reported fifteen years of underground coal mine employment, and at least a thirty pack-year smoking history ending two weeks prior to the examination. Dr. Robinette found severe emphysema with evidence of bullae and interstitial fibrosis, predominantly confined to the lower lung zones, a history of coal dust exposure with a total of fifteen years of continuous mining employment, a history of recurrent pneumonia, and profound oxygen desaturation with exercise. Dr. Robinette provided an overview of the medical literature relevant to the pathological processes associated with coal mine exposure. He

recognized that Claimant has several factors contributing to his respiratory impairment, most notably a history of severe cigarette consumption and a past history of dust exposure. Dr. Robinette concluded that Claimant is totally disabled from working as a result of his lung disease, which is severe, progressive in nature and probably partially related to his coal dust exposure.

Dr. Kirk E. Hippensteel, who is board-certified in internal medicine and pulmonary diseases provided a medical record review dated February 14, 2000 (E-3). Dr. Hippensteel reviewed three x-ray interpretations of the September 29, 1999 film and two of the January 22, 1999 film. He also reviewed two pulmonary function studies, an arterial blood gas study, and the physical examination performed by Dr. Dahhan. Dr. Hippensteel also considered his record review dated June 6, 1994, his examination of Claimant on September 17, 1997, his record review dated October 8, 1997, and his deposition dated March 5, 1998. Dr. Hippensteel pointed out that Claimant's "fair" cooperation during the September 29, 1999 pulmonary function study resulted in the study being so fraught with the effects of poor effort that it is invalid for use as evidence. He thought the August 5, 1998 pulmonary function study was also flawed, noting that Claimant's peak effort results suggest an underestimation of true function. Dr. Hippensteel concluded that the additional medical records reviewed in this case do not alter the conclusions he reached in his previous examination and record review. He concluded that Claimant has had increasing obstructive lung disease since leaving work in the mines in 1991, while continuing to smoke at least through 1997. These findings, he explained, would not be consistent with industrial bronchitis, which should improve rather than worsen after leaving exposure to an offending industrial irritant. Dr. Hippensteel concluded that Claimant is disabled from resuming his former coal mine employment and stated with reasonable medical certainty that, from a pulmonary standpoint, Claimant would have been just as ill as he is now had he never set foot in the mines. Dr. Hippensteel does not believe that the additional medical records show that there has been a definite change in condition since he examined Claimant in 1997, and that even if the additional tests validly showed a deterioration, he believes that the additional evidence has not shown that it has resulted from his prior coal dust exposure.

Dr. Maurice E. Nida[14], who is board-certified in internal medicine, provided a letter dated February 15, 2000 (C-2). In his letter, Dr. Nida explained that he has treated the Claimant for several years and believes that he suffers from coal workers' pneumoconiosis and that he is disabled due to his pneumoconiosis with an element of COPD. He believes the coal workers' pneumoconiosis is related to underground coal working and that there is no way that Claimant could return to any kind of work. Dr. Nida noted that Claimant is treated with maximum therapy with breathing medication of Theo-Dur, Accolate, Flovent, Claritin, Combivent, Serevent, and neubulization treatments, and that Claimant comes to his office often to receive IM injections with antibiotics to treat exacerbations of COPD and coal workers' pneumoconiosis.

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[14] The professional credentials of this physician are not in evidence. However, this tribunal takes judicial notice that this physician's relevant qualifications are disclosed on the worldwide web, American Board of Medical Specialties, Who's Certified Results, at http://www.abms.org.

Dr. Nida provided office progress notes from his treatment of Claimant from March 6, 1997 through February 15, 2000 (C-3). The progress notes indicate that Claimant suffers from COPD that is often exacerbated. A diagnosis of coal workers' pneumoconiosis appears and disappears throughout the progress notes, sometimes preceded by "possible" or "probable." Notes from March 17, 1997 indicate that Claimant "clearly stated" that he had a history of pneumoconiosis on September 18, 1996 and that he, Dr. Nida, and Dr. Sy agreed with this statement. The notes indicate that Claimant responds both positively and negatively to treatment with various medications for his COPD and pneumoconiosis. Claimant has also been treated for pneumonia, various infections, influenza, anxiety, a benign breast mass, and a lung nodule. The notes indicate that Claimant is totally disabled.

Dr. Dahhan provided a supplemental report dated March 22, 2000 (E-6). Dr. Dahhan reviewed the x-ray, pulmonary function and arterial blood gas studies, and report provided by Dr. Robinette. He also considered his own examinations of the Claimant in 1994 and 1999 as well as his review of medical records on previous occasions. Dr. Dahhan concluded that Claimant has a disabling obstructive ventilatory abnormality, he does not retain the physiological capacity to return to his previous coal mining work or work of comparable physical demand, and that his pulmonary disability is a result of severe obstructive airway disease. He also noted that Claimant's obstructive airway disease did not result from coal dust exposure because the medical literature indicates that his loss of FEV1 is significantly greater than that seen with coal dust induced loss. Moreover, Dr. Dahhan pointed out that Claimant's treating physician prescribes various bronchodilators for his airway disease, and the physician would only do this if he believes that Claimant's condition is responsive to them. Dr. Dahhan notes that such a response is inconsistent with the permanent adverse affects of coal dust induced disease. He concluded his report by reiterating that Claimant's significant smoking history is sufficient to cause such a disabling obstructive ventilatory defect in a susceptible individual.

Dr. Hippensteel provided a supplemental report dated March 30, 2000, for which he reviewed additional medical records including two other x-ray interpretations of the October 22, 1999 film, the pulmonary function and arterial blood gas studies dated October 22, 1999, and the physical examination performed by Dr. Robinette (E-5). The additional records did not change the conclusions he reached in his February 14, 2000 report. Dr. Hippensteel pointed out that bullous emphysema is not associated with coal workers' pneumoconiosis, and that Claimant's development of his severe obstructive disease was temporally related to the time that he continued to smoke after leaving work in the mines. He stated that the findings on the x-ray are suggestive of interstitial markings referable to smoking, rather than coal workers' pneumoconiosis. Dr. Hippensteel concluded that Claimant suffers from cigarette smoking induced chronic obstructive lung disease rather than coal dust induced obstructive lung disease.

Dr. Hippensteel provided a second supplemental report, dated March 30, 2000, upon review of two x-ray interpretations of the October 22, 1999 film, a letter provided by Dr. Nida, and office progress notes from March 6, 1997 to February 15, 2000 by Dr. Nida (E-7). Dr. Hippensteel criticized Dr. Nida's failure to address Claimant's smoking history and his reasoning for determining that Claimant has pneumoconiosis. He also indicated that Dr. Nida may be inappropriately treating Claimant with allergy

medication, which is an ineffective treatment for coal workers' pneumoconiosis. The additional evidence did not alter Dr. Hippensteel's previous conclusions. He noted that Dr. Nida's progress notes do not show anything more than that Claimant had multiple infection episodes that exacerbated airway inflamation and breathing. As for the x-ray interpretations, Dr. Hippensteel commented that the increased interstitial markings are common to patients with chronic bronchitis and COPD, even if they have never worked in a coal mine. He concluded that Claimant has COPD with recurrent infections that exacerbate this condition and are unrelated to prior coal mine employment. All of Claimant's problems are related to recurrent infections in the sinuses and chest, possible allergies, and cigarette smoking history.

Dr. Dahhan provided a second supplemental report dated April 25, 2000 based on his review of two x-ray interpretations of the October 22, 1999 film, a letter provided by Dr. Nida, and office progress notes from March 6, 1997 to February 15, 2000 by Dr. Nida (E-8). He continued to conclude that Claimant has an obstructive ventilatory defect based on the various reports from Dr. Nida that he is being treated with multiple bronchodilators, antibiotics and steroids, which are medications not used for treatment of coal dust induced disease. The additional medical data did not require him to change his findings of his previous report of September 29, 1999.

Previously Submitted Evidence

The previously submitted evidence is set forth at Director's Exhibits 82 and 116, which are the opinions of Judges Levin and Morgan, respectively. This tribunal finds that these judges reviewed the evidence accurately and set it out accordingly.

Conclusions of Law and Discussion

Existence of Pneumoconiosis

Section 718.202(a) provides four bases for finding the existence of pneumoconiosis: (1) a properly conducted and reported chest x-ray; (2) a properly conducted and reported biopsy or autopsy; (3) reliance upon certain presumptions which are set forth in §§ 718.304, 718.305, and 718.306; or (4) the findings by a physician of pneumoconiosis as defined by §718.201 which is based upon objective evidence and a reasoned medical opinion. The record contains no evidence of biopsy, and the presumptions under §§ 718.304, 718.305, and 718.306 are inapposite because there is no evidence of complicated pneumoconiosis, the claim was filed after 1981, and the miner is living.

Since the request for modification was filed, eleven x-ray reports based on three different films have been admitted into evidence. The January 22, 1999 x-ray was interpreted as negative for pneumoconiosis by Dr. Gopalan, a board-certified radiologist, and Dr. Lippman, a B-reader (D-117, 120). The September 29, 1999 x-ray was interpreted as negative by three B-readers, two of whom are dually qualified board-certified radiologists (D-128; E-1). The October 22, 1999 x-ray is the only new film to have mixed interpretations. Drs. Wheeler and Scott, both dually qualified board-certified radiologists and B-readers,

interpreted the film as negative (E-9). Drs. Aycoth and Cappiello, who are also both dually qualified board-certified radiologists and B-readers, read the film as positive for pneumoconiosis, 1/0, category p/p (C-4,5). Dr. Robinette, a B-reader, did not indicate whether pneumoconiosis is present, and read the film as 0/1, category s/t, an interpretation that is not affirmative evidence of pneumoconiosis (C-1). §718.102(b). Dr. Coburn, a dually qualified board-certified radiologist and B-reader, submitted an x-ray report documenting his interpretation of the October 22, 1999 film (C-1). Dr. Coburn did not classify the film as positive for pneumoconiosis, but finding interstitial markings, concluded that such markings were "consistent with the patient's primary history of Coalworker's Pneumoconiosis." In his report, Dr. Coburn does not indicate why he presupposed a history of pneumoconiosis, or that he independently found evidence of pneumoconiosis. While the interpretations of the October 22, 1999 may be described as equivocal, based on Dr. Coburn's failure to review the film independently and objectively in accordance with ILO standards, this tribunal finds that as a whole, they do not indicate the presence of pneumoconiosis. Based on review of the eleven x-ray interpretations, this tribunal finds that the preponderance of the x-ray evidence submitted in conjunction with this request for modification does not establish the existence of pneumoconiosis. This tribunal's finding is consistent with the entirety of the x-ray evidence of record, which, on review, indicates that of nine different x-rays, interpreted a total of twenty-six times, not a single film was ever interpreted as positive for pneumoconiosis.

The reasoned opinions of the physicians of record for this request for modification also fail to establish the existence of pneumoconiosis under §718.202(a)(4). There are several factors that an Administrative Law Judge must consider in determining the weight to accord a particular opinion. *See Island Creek Coal Co. v. Director, OWCP*, 211 F.3d 203, 212 (4th Cir. 2000). In *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997), the United States Court of Appeals for the Fourth Circuit stated, "In weighing opinions, the ALJ is called upon to consider their quality." The Court listed factors to be considered, including the qualifications of the experts, the opinions' reasoning, their reliance on objectively determinable symptoms and established science, their detail of analysis, and their freedom from irrelevant distractions and prejudices. *See Id.* at 951. Additionally, amended §718.104(d) provides that, in weighing the medical evidence relevant to whether the miner suffers from pneumoconiosis, the adjudicator must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record.

In this case, of the four physicians[15] who examined the Claimant and/or reviewed Claimant's medical records since the previous denial of benefits, only one, Dr. Nida, concluded that Claimant has pneumoconiosis. While the evidence indicates that Dr. Nida is Claimant's treating physician, amended §718.104(d) does not apply retroactively to the evidence related to Dr. Nida's treatment as it was all developed by Claimant prior to the effective date of the amended regulations, January 19, 2001. 65 Fed. Reg. 79,933. Moreover, although more weight may be accorded to the conclusions of a treating physician,

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[15] This tribunal notes that all four physicians are equally credentialed as board-certified in internal medicine. Only Dr. Nida is not board certified in pulmonary diseases.

despite his relationship with Claimant, Dr. Nida's opinion is not persuasive in light of the *Underwood* factors and in consideration of the evidence and other opinions of record. *Tedesco v. Director, OWCP*, 18 B.L.R. 1-103 (1994) (An administrative law judge "is not required to accord greater weight to the opinion of a physician based solely on his status as claimant's treating physician. Rather, this is one factor which may be taken into consideration....").

The evidence of record contains office progress notes from Dr. Nida's treatment of Claimant from March 6, 1997 through February 15, 2000 (C-3). Dr. Nida's earliest description of pneumoconiosis occurs in an office note related to a follow up visit dated March 17, 1997. In that note, Dr. Nida explains that he had sent Claimant to Dr. Sy "because of a history of coal worker's pneumoconiosis." It further states, "Dr. Sy thinks he has elements of this and he's currently undergoing testing to see exactly what's showing up." Based on this follow up visit, Dr. Nida indicated, "Plan: I agree with Dr. Sy in that he has a history of pneumoconiosis clearly stated by the patient on 9/18/96." In the progress notes spanning the following months and years, Claimant saw Dr. Nida on numerous occasions for treatments of exacerbation of COPD. Throughout these notes, Dr. Nida varies his perception of Claimant's pneumoconiosis. From May 16 through June 19, 1997, progress notes indicate that Claimant definitely has pneumoconiosis. However, from July 2 through August 13, 1997, the assessment is that pneumoconiosis is "probable." The diagnosis again becomes definitive on September 12, 1997, however, on November 4, 1997, it is only "possible," and the diagnosis disappears from progress notes altogether until it reappears on February 19, 1998 as "possible." Pneumoconiosis again is definitive on June 2, 1998, where it remains in the progress notes until February 15, 2000 when Dr. wrote a letter to Claimant's attorney expressing his opinion regarding Claimant's pneumoconiosis (C-2). In that letter, Dr. Nida states that Claimant is totally disabled secondary to his coal worker's pneumoconiosis with an element of COPD, which he believes is related to underground coal working. Dr. Nida also explains that Claimant is on maximum therapy with various breathing medications and nebulization treatments.

Dr. Nida's opinion is entitled to less weight because it is unreasoned and undocumented, and his diagnosis of pneumoconiosis is not based on objective evidence. From review of the progress notes, the only reason available to explain Claimant's pneumoconiosis is that Claimant himself told Dr. Nida on September 18, 1996 that he has a history of pneumoconiosis (see also D-96). The evidence of record submitted pursuant to the prior request for modification contains the medical report of Dr. Alexander Sy, who is board-certified in internal medicine and critical care medicine (D-96). Dr. Sy examined the Claimant on January 30, 1997. Dr. Sy considered medical history, family history, a history of fifteen and one-half years of underground coal mine employment, a smoking history of smoking one-half to one pack of cigarettes per day for twenty years, the results of an examination he performed, and the results of an x-ray, a pulmonary function study, and a blood gas study. Dr. Sy diagnosed Claimant with chronic bronchitis, coal workers' pneumoconiosis, and emphysema. As explained and properly evaluated by Judge Morgan in Claimant's previous denial, Dr. Sy's opinion is not persuasive because his diagnosis of coal workers' pneumoconiosis relies primarily on Claimant's complaints and the physical examination (D-116). *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000). By adopting Dr. Sy's conclusions without considering objective evidence, or providing his own reasoning as to why he continues to consider

Claimant's complaints of pneumoconiosis, without more, as conclusive evidence that Claimant suffers from pneumoconiosis, Dr. Nida provides this tribunal with ample reasons to accord his opinion less weight. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989) *(en banc)*; *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987); *Phillips v. Director, OWCP*, 768 F.2d 892 (8th Cir. 1985).

Dr. Robinette's opinion is equivocal and therefore entitled to little weight. *Griffith v. Director, OWCP*, 49 F.3d 184 (6th Cir. 1995). Dr. Robinette did not diagnose Claimant with pneumoconiosis, but did find severe pulmonary emphysema with evidence of bullae and interstitial fibrosis, a history of fifteen years of coal mine employment, a history of pneumonia, and profound oxygen desaturation with exercise (C-1). In discussing the etiology of Claimant's condition, Dr. Robinette provided an overview of the pathological processes associated with coal mine exposure, and recognized that Claimant's significant cigarette consumption and history of dust exposure could contribute to his respiratory impairment. However, in his final conclusion, Dr. Robinette summarized his findings, stating, "His lung disease is severe, progressive in nature and probably is partially related to his dust exposure." While Dr. Robinette's opinion is well reasoned and documented, he did not provide a definite statement that Claimant's respiratory impairment was caused, even in part, by his history of coal dust exposure.[16] Accordingly, this tribunal finds that Dr. Robinette's opinion does not support a finding that Claimant has pneumoconiosis. *Justice v. Island Creek Coal Co.*, 11 B.L.R. 1-91 (1988).

Drs. Hippensteel and Dahhan provided opinions that are well reasoned, documented, and supported by objective evidence, and, therefore, this tribunal accords them controlling weight. Dr. Dahhan first examined the Claimant on January 28, 1994 (D-72). Since then, Dr. Dahhan has examined Claimant again, provided several medical records reviews, and was deposed in connection with Claimant's previous request for modification. Of primary interest in this claim, is Dr. Dahhan's more recent examination and record review. Dr. Dahhan examined Claimant on September 29, 1999 (D-128). In conjunction with the full examination, Dr. Dahhan reconsidered submitted records and his own prior reports and examination. Dr. Dahhan found that there was insufficient objective data to justify the diagnosis of coal workers' pneumoconiosis. He explicitly based this finding on "the obstructive abnormalities on clinical examination of the chest, severe obstructive abnormality on spirometry testing associated with air trapping, over inflation and diffusion impairment as well as negative x-ray findings for pneumoconiosis with the presence of severe emphysema and bullae." He did find that Claimant has obstructive airway disease as evidenced by the clinical and physiological parameters of his respiratory system. Dr. Dahhan ruled out an etiology of coal

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[16] This tribunal notes that the coal mine employment history utilized by Dr. Robinette is excessive, as this tribunal credits Claimant with at least nine years of coal mine employment, Judge Morgan credited Claimant with at least ten years, and Judge Levin credited Claimant with at least eleven years. None of these employment histories as evidenced by Claimant's own reported work history, social security records, hearing testimony, and corroborating evidence from past employers comes close to fifteen and one-half years. This discrepancy reduces the credibility of Dr. Robinette's opinion. *Long v. Director, OWCP*, 7 B.L.R. 1-256 (1985).

dust exposure or occupational pneumoconiosis, noting that Claimant has not been exposed to coal dust since 1991, a period sufficient to cause cessation of any industrial bronchitis that he may have had. He also noted the lack of evidence of progressive massive fibrosis and the fact that Claimant's treating physician treats his obstructive airway disease with multiple bronchodilators. Dr. Dahhan explained that such treatment is inconsistent with the permanent adverse affects of coal dust on the respiratory system.

Dr. Dahhan provided his first supplemental report on March 22, 2000 (E-6). For that report, Dr. Dahhan again reconsidered his earlier findings and considered newly submitted evidence. Dr. Dahhan reiterated his previous findings. Additionally, in support of his conclusions, Dr. Dahhan, citing medical literature, explained that Claimants loss in FEV1 is significantly greater than that observed in populations whose loss is known to be caused by coal dust inhalation. Dr. Dahhan also pointed out that Claimant's lengthy smoking history was sufficient to cause the development of the defect seen in Claimant.

In his second supplemental report, Dr. Dahhan considered new evidence, including Dr. Nida's treatment notes of Claimant (E-8). The new evidence did not offer any findings that would require him to alter his previous conclusions.

Dr. Dahhan has had the opportunity to observe the Claimant for over five years and has reviewed much if not all of the medical evidence of this claim. His opinions indicate that he has considered all of the objective evidence submitted to him and he has reasoned with a great deal of medical certainty, and with an understanding of the relevant scientific literature. Dr. Dahhan's findings remain consistent with both his own prior conclusions and the weight of the evidence presented to him for review, and this tribunal therefore accords his opinion that Claimant suffers from an obstructive airways disease, unrelated to his coal mine employment history, great weight. *Church v. Eastern Assoc. Coal Corp.*, 20 B.L.R. 1-8 (1996).

Dr. Hippensteel has also had the opportunity to observe the Claimant for over five years and has reviewed a substantial portion of the medical evidence available in this record. Dr. Hippensteel provided his first record review for this request for modification on February 14, 1999 (E-3). In addition to submitted medical evidence, Dr. Hippensteel reconsidered his prior examination, record reviews, and deposition relating to this claim. He found that the submitted evidence does not alter the previous conclusions he reached in regard to this Claimant. Dr. Hippensteel explained that Claimant has experienced increasing obstructive lung disease since leaving the coal mines in 1991, while continuing to smoke, and not accompanied by expected worsening radiographic evidence of pneumoconiosis. Additionally, Dr. Hippensteel explained that the additional evidence he reviewed did not indicate an etiology of coal dust inhalation because bullous emphysema, which Claimant has, is not associated with pneumoconiosis and that the other factors indicate that Claimant's smoking is temporally related to the deterioration in lung function

he is experiencing.[17] Therefore, Dr. Hippensteel concluded that Claimant's pulmonary impairment was not caused by coal dust inhalation and was instead caused by his "significant other medical problems unrelated to coal dust exposure."

Dr. Hippensteel provided two supplemental reports based on additional evidence and reconsideration of his past findings (E-5,7). In both reports, Dr. Hippensteel reiterated his previous findings and noted that additional evidence does not change his original conclusions. In the report dated March 30, 2000, Dr. Hippensteel responded to the x-ray reports of Drs. Robinette and Coburn. He asserted that their findings are suggestive of interstitial markings referable to smoking, rather than coal workers' pneumoconiosis. In his second report, dated April 17, 2000, Dr. Hippensteel provided a critical review of Dr. Nida's treatment notes (E-7). He pointed out that nothing in those notes indicated that the infection episodes that exacerbated airway inflamation had any relation to Claimant's prior coal dust exposure. He also noted that no comments were made regarding Claimant's CT scan, which he claims is the most sensitive test for pneumoconiosis. Of some interest, is Dr. Hippensteel's recognition that Dr. Nida does not discuss Claimant's smoking history or any possible interaction with his breathing problems. This is an indication that Dr. Nida may be overlooking or ignorant of possible contributors to Claimant's disease, and therefore, does not have an accurate understanding of Claimant's condition. *Stark v. Director, OWCP*, 9 B.L.R. 1-36 (1986). Of some possible concern to Claimant, coupled with Dr. Dahhan's comments, is Dr. Hippensteel's comment that Dr. Nida treats Claimant with allergy medication, which is not effective treatment for pneumoconiosis, nor are allergies related to coal dust exposure. Dr. Hippensteel cautioned that either Dr. Nida is treating Claimant with an inappropriate medicine or he is leaving out a causitive factor to Claimant's respiratory distress. Dr. Hippensteel concluded that Claimant's "problems" are not related to his prior coal mine employment, but, instead, are referable to recurrent infections, possible allergies, and his cigarette smoking history. Because Dr. Hippensteel's opinion is well documented and reasoned, as well as supported by not only the evidence submitted for this request for modification, but by evidence previously admitted to the record, this tribunal finds his opinion entitled to great weight. *Church v. Eastern Assoc. Coal Corp.*, 20 B.L.R. 1-8 (1996); *Church v. Eastern Assoc. Coal Corp., 21 B.L.R. 1-5 (1997), rev'd in part and aff'd in part on recon*, 20 B.L.R. 1-8 (1996).

Based on review of the medical opinions submitted for this request for modification and in consideration of those opinions previously admitted, this tribunal finds that Claimant has not established that he has pneumoconiosis by a preponderance of the medical opinion evidence. While this tribunal finds that Claimant does suffer from an obstructive airways disease, the reasoned medical opinions indicate that this

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[17] This tribunal notes that while amended §718.201(c) recognizes that pneumoconiosis is a latent and progressive disease which may first become detectable only after cessation of coal mine dust exposure, an administrative law judge logically cannot infer that a Claimant's condition has worsened if there is no affirmative medical evidence to that effect in the record. Accordingly, Dr. Hippensteel's observations are not in conflict with the Act.

disease is not attributable to Claimant's coal mine employment, but instead, is attributable to Claimant's smoking habit, which continued from at least six to eight years after Claimant left the mines, and Claimant's other health problems. Consequently, upon consideration of all the evidence under §718.202, this tribunal finds that Claimant has failed to establish the existence of pneumoconiosis. *See Island Creek Coal. Co. v. Compton*, 211 F.3d 203 (4th Cir. 2000).

Causation

In addition to establishing the existence of pneumoconiosis, a claimant must also establish that his pneumoconiosis arose, at least in part, out of his coal mine employment. Pursuant to §718.203(b), a claimant is entitled to a rebuttable presumption of a causal relationship between his pneumoconiosis and his coal mine employment if he worked for at least ten years as a coal miner. In the instant case, Claimant established approximately nine years of coal mine employment. Therefore, even had he established the existence of pneumoconiosis, Claimant would not be entitled to the rebuttable presumption of §718.203(b), and would have to prove the element of causation by a preponderance of the evidence. However, because Claimant was unable to establish that he has pneumoconiosis, the issue of causation is moot.

Total Disability

Section 718.204(b)(2) provides the criteria for determining whether a miner is totally disabled. These criteria are: (1) pulmonary function tests qualifying under applicable regulatory standards; (2) arterial blood gas studies qualifying under applicable regulatory standards; (3) proof of pneumoconiosis and cor pulmonale with right sided congestive heart failure; or (4) proof of a disabling respiratory or pulmonary condition on the basis of the reasoned medical opinions of a physician relying upon medically acceptable clinical and laboratory diagnostic techniques. If there is contrary evidence in the record, all the evidence must be weighed in determining whether there is proof by a preponderance of the evidence that the miner is totally disabled by pneumoconiosis. *Shedlock v. Bethlahem Mines Corp.*, 9 B.L.R. 1-95 (1986).

There are eleven pulmonary function studies of record. The first five, taken between August 11, 1987 and January 28, 1994, did not produce qualifying values (D-12, 30, 56, 72, 82). The second set of three studies, taken between August 27, 1996 and September 17, 1997, all produced qualifying values, and, accordingly Judge Morgan found that Claimant established total disability pursuant to §718.204(c)(1) (D-96, 108, 116).

Three additional pulmonary function studies have been submitted in connection with this request for modification. The study conducted on August 5, 1998 produced qualifying values (D-117, 121). However, it is notable that, while the administering technician noted "good" cooperation and effort, Dr. Hippensteel, upon review, observed that the tidal volumes on the MVV tests were very low and peak effort results suggest an underestimate of true function on the test (E-3). While Dr. Hippensteel's opinion may be accorded greater weight than that of the administering technician, as he did not definitively state that the study itself was invalid, and Dr. Dahhan, who also reviewed the study and is equally qualified, did not find the study invalid, this tribunal finds that the study is both valid and qualifying. *Street v. Consolidation Coal*

Co., 7 B.L.R. 1-65 (1984). The study conducted on September 29, 1999 also produced qualifying results (D-128). The administering technician noted "fair" cooperation, and Dr. Dahhan found the study acceptable. However, Dr. Hippensteel again disagreed, finding the test so fraught with the effects of poor effort, that it is invalid (E-3). A study where "fair" effort is noted may be conforming. *Laird v. Freeman United Coal Co.*, 6 B.L.R. 1-883 (1984); *Verdi v. Price River Coal Co.*, 6 B.L.R. 1-1067 (1984);

Whitaker v. Director, OWCP, 6 B.L.R. 1-983 (1984). Therefore, while this tribunal finds the September 29, 1999 study valid, it is of less probative value due to the possibility that its results are tainted by Claimant's effort. Finally, the study dated October 22, 1999 also yielded qualifying values, and none of the physicians found reason to doubt its validity. The qualifying results of these three studies are consistent with the previous three studies. Thus, based on the preponderance of the pulmonary function study evidence, this tribunal concurs with Judge Morgan determination that Claimant established total disability pursuant to §718.204(b)(2)(i), and that newly submitted evidence supports that finding.

Of the four arterial blood gas studies submitted prior to this request for modification and the two submitted in conjunction with it, none yielded qualifying values under Appendix C to Part 718. Therefore, Claimant has not established total disability by a preponderance of the evidence pursuant to §718.204(b)(2)(ii).

There is no evidence of cor pulmonale with right-sided congestive heart failure. Therefore, the Claimant has not proved total disability pursuant to §718.204(b)(2)(iii).

Finally, the medical opinions of the physicians who either examined the Claimant or reviewed the medical evidence must be considered. §718.204(b)(2)(iv). Dr. Nida believes that Claimant is totally disabled secondary to coal workers' pneumoconiosis with an element of COPD (C-2). Putting aside his diagnosis of pneumoconiosis, Dr. Nida has stated in progress notes that Claimant is totally disabled "because of his lungs" (C-3). Dr. Robinette also found Claimant totally disabled due to his lung disease, which he described as severe and progressive in nature (C-1). Similarly, Dr. Dahhan opined that from a respiratory standpoint, Claimant does not retain the physiological capacity to continue his previous coal mining work or a job of comparable physical demand because of his obstructive airway disease (D-128). Dr. Hippensteel found that even without consideration of the pulmonary function studies that he felt underestimated Claimant's true lung function, Claimant's pulmonary impairment is significant enough to prevent him from returning to his previous employment in the coal mines (E-3). Therefore, the medical opinions submitted in conjunction with this request for modification unanimously support a finding of total disability under §718.204(b)(2)(iv). This conclusion is in accord with the evidence of record and the previous decisions of Judges Morgan and Levin, who also found that Claimant established total disability via physician's opinions (D-82, 116).

Upon consideration of all the evidence of record, this tribunal finds that Claimant has established by a preponderance of the evidence that he is totally disabled pursuant to 718.204(b)(2).

Total Disability Due to Pneumoconiosis

To establish entitlement, a claimant must prove by a preponderance of the evidence that his pneumoconiosis arose at least in part from his coal mine employment, and that he is totally disabled as a result of the pneumoconiosis. *See Adams v. Director, OWCP*, 886 F.2d 818, 820, 13 B.L.R. 2-52 (6th Cir. 1989). A miner is considered totally disabled due to pneumoconiosis if pneumoconiosis is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. §718.204(c)(1). Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it has a material adverse effect on the miner's respiratory or pulmonary condition, or it materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment. *Id.*

As previously discussed, of the physicians involved in this request for modification, only Dr. Nida has indicated that Claimant's disability is related to his prior coal mine employment. However, to reiterate, Dr. Nida's diagnosis of pneumoconiosis and its affect on Claimant's total disability is unsupported by the evidence of record and is soundly refuted by the other physicians involved in this case. Drs. Dahhan and Hippensteel attribute Claimant's respiratory impairment to his history of cigarette consumption. Dr. Hippensteel justified his conclusion that all of the Claimant's respiratory impairment is due to his smoking history (and recurrent infections and possible allergies), by noting that the interstitial markings evident on Claimant's x-rays are referable to smoking and that the development of the disease was temporally related to the time Claimant continued to smoke (E-5, 7). Dr. Hippensteel also pointed out that Claimant suffers from bullous emphysema, which is not associated with coal workers' pneumoconiosis. *Id.* Dr. Dahhan supported his conclusion by citing scientific studies that indicate that Claimant's loss in lung function far exceeds the loss observed when caused solely by coal dust inhalation, thereby indicating the presence of a different etiologic factor (E-6). Dr. Robinette's opinion on disability was inconclusive. While he cited Claimant's histories of severe cigarette consumption and dust exposure as contributing factors to his disabling lung disease, Dr. Robinette did not unequivocally conclude that coal dust inhalation was a substantially contributing cause of Claimant's impairment (C-1). Based on this evidence, this tribunal finds that the Claimant has failed to establish that his disabling respiratory impairment was in any way caused by pneumoconiosis or that his coal mine employment contributed substantially to his disability.

Review of the evidence previously admitted to the record regarding the causation of Claimant's total disability overwhelmingly affirms a finding that Claimant's disability is unrelated to his previous coal mine employment, and is instead attributable to his extensive smoking history. Of particular note are the many opinions of Drs. Dahhan and Hippensteel, who have consistently provided reasoned opinions based on objective evidence, and have had the opportunity to examine the Claimant and review the majority, if not all, of, the evidence of this case. Based on the evidence of the entire record, this tribunal finds that, while the Claimant is totally disabled by a respiratory impairment, his disability is unrelated to his previous coal mine employment.

Conclusions

Based on the foregoing analysis, this tribunal concludes that the Claimant has failed to establish either a change in conditions since the July 24, 1998 denial of his claim, or a mistake in a determination of fact. Claimant has established that he is totally disabled, from a pulmonary standpoint, from performing his last coal mine employment. However, he has not proven that he has pneumoconiosis or that his total disability is due to pneumoconiosis. He is therefore not entitled to benefits.

The Benefits Review Board's decision in *Garcia v. Director, OWCP*, 12 B.L.R. 1-24 (1988) permits the filing of an infinite number of modification petitions in a single claim, thereby affording any party the opportunity to continually submit new evidence or arguments to be considered under the less stringent modification standard at §725.310 as opposed to that for duplicate claims at §725.309. This petition for modification represents Claimant's fourth attempt to secure benefits under the Act. While Claimant is fully within his right to file petition after petition, this tribunal's review of the record indicates that Claimant has repeatedly failed to produce any evidence indicating that a change in conditions has occurred or that there has been a mistake in a determination of fact. Moreover, Claimant has exhausted the use of his treating physician, having submitted in two separate proceedings, the entirety of his medical records. Three Administrative Law Judges have reviewed the evidence of the case and the findings of their peers. While it is entirely possible that Claimant can develop further evidence regarding his claim, this tribunal cautions that Claimant keep in the forefront of his mind that in order to succeed with a petition for modification, Claimant must either establish through evidence developed subsequent to the date of this denial that he has experienced a change in conditions or that this tribunal, or those before it, made a mistake in the determination of fact.

Attorney's Fee

The award of an attorney's fee under the Act will be approved only in cases in which the claimant is found to be entitled to benefits. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for services of an attorney rendered to the Claimant in pursuit of this claim.

ORDER

The claim of Billy R. Collins for benefits under the Act is hereby denied.

A
EDWARD TERHUNE MILLER
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 (thirty) days from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington, D.C. 20013-7601. A copy of this Notice of Appeal must also be served on Donald S. Shire, Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C. 20001.